STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2017
v	No. 333996 Allegan Circuit Court
TROY LAVAUGHN JONES, JR., Defendant-Appellant.	LC Nos. 08-015991-FH; 08-016032-FH

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant, Troy LaVaughn Jones, Jr., appeals as of right the trial court's June 30, 2016 order, which was entered following a *Crosby*[1] remand, that reaffirmed defendant's sentence of 96 months to 18 years' imprisonment for his conviction of assault with intent to commit great bodily harm, MCL 750.84. We affirm in part and remand in part.

I. BACKGROUND

In lower court no. 08-015991-FH, defendant was charged with two counts of assault with intent to commit great bodily harm for assaulting Tanya Rogers and Deborah Jones.[2] In lower court no. 08-016032-FH, defendant was charged with witness tampering, MCL 750.122. The two cases were consolidated for trial. A jury convicted defendant of assaulting Rogers, acquitted defendant of assaulting Deborah, and convicted defendant of witness tampering. In 2009, the trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to consecutive sentences of 120 to 240 months for the assault conviction and 28 to 72 months for the witness tampering conviction.

Defendant appealed. A panel of this Court affirmed defendant's convictions but remanded for resentencing in light of errors in scoring the offense variables (OVs). See *People v*

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

[2] Because defendant and the alleged second victim, Deborah Jones, have the same last name, we use Deborah's first name throughout this opinion.

Jones, unpublished opinion per curiam of the Court of Appeals, issued September 27, 2011 (Docket Nos. 292793, 292794), pp 1, 8-11.

At resentencing in November 2012, the trial court stated that, based on the panel's opinion, defendant had an OV score of 35 points for the assault conviction. Using judge-found facts, the trial court scored OV 9, MCL 777.39 (number of victims), at 10 points, and OV 12, MCL 777.42 (contemporaneous felony activity), at five points based on the trial court's finding that there were two victims, Rogers and Deborah, and Deborah was contemporaneously assaulted with Rogers. The minimum sentence range was 29 to 114 months. The trial court resentenced defendant within this range to consecutive sentences of 96 months to 18 years on the assault conviction and 28 to 72 months on the witness tampering conviction. If judge-found facts had not been used to score OVs 9 and 12, the minimum sentence range would have been 10 to 42 months.

Defendant again appealed to this Court, and his sentences were affirmed. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2014 (Docket Nos. 315582, 315713), pp 1, 4-8.

Defendant then applied for leave to appeal to the Supreme Court. On March 29, 2016, the Supreme Court remanded the cases to the trial court:

> The application for leave to appeal the September 23, 2014 judgment of the Court of Appeals and the motions to remand and for appeal bond are considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND these cases to the Allegan Circuit Court to determine whether the court would have imposed materially different sentences under the sentencing procedure described in *People v Lockridge*, 498 Mich 358[; 870 NW2d 502] (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. The trial court shall also consider the defendant's argument concerning the imposition of costs, and determine whether costs should be imposed and the amount, if any, that should be assessed. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. [*People v Jones*, 499 Mich 875, 875-876 (2016).]

Defendant moved the trial court to be resentenced for his assault conviction. At a June 20, 2016 hearing, the trial court determined that it would not have imposed a materially different sentence on defendant had it known that the sentencing guidelines were advisory and affirmed defendant's sentence. Defendant again appeals his sentence.

II. ANALYSIS

A. The Trial Court Complied With *Lockridge*

Judicial Fact-Finding Is Appropriate At Sentencing. On appeal, defendant argues that in a *Crosby* remand a trial court must score the sentencing guidelines without using judge-found facts and then, in order to determine whether it would have imposed a materially different sentence but for the unconstitutional constraint on its discretion, it must compare the minimum sentence ranges that were reached with and without using judicially found facts. We disagree.

In Part VI of the *Lockridge* opinion, the Supreme Court held that "all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure" were entitled to a *Crosby* remand. *Lockridge*, 498 Mich at 395. On remand under *Crosby,* the trial court must "determine whether it would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id.* at 397. The Supreme Court further explained:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the "circumstances existing at the time of the original sentence." [*Crosby*, 397 F3d at 117]; see also *United States v Ferrell,* 485 F3d 687, 688 (CA 2, 2007) (holding that the trial court's failure to consider the circumstances as they existed at the time of the resentencing hearing, including evidence of the defendant's post-judgment prison rehabilitation, did not violate the defendant's due process rights). [*Id.* at 398-399.]

Defendant's claim that a trial court, in a *Crosby* remand, must score the sentencing guidelines without using judge-found facts is contrary to *Lockridge.* In *Lockridge*, the Supreme Court stated that the sentencing guidelines remain a highly relevant consideration and that trial courts must score the guidelines and take into account the minimum sentence range when sentencing a defendant. *Id*. at 365, 391. The Supreme Court expressly contemplated trial courts using judge-found facts in scoring the sentencing guidelines, *id.* at 391-392, and stated that its "holding today does nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not," *id.* at 392 n 28. Further, in *People v Biddles*, 316 Mich App 148, 159-161; 896 NW2d 461 (2016), this Court, upon reviewing *Lockridge*, disagreed "with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV scores under the guidelines." This Court concluded, as we reiterate today, that the use of judge-found facts to

score the sentencing guidelines is proper so long as the sentencing guidelines are advisory. *Id.* at 159.

Finally, if there was any doubt as to the propriety of judicial fact-finding post-*Lockridge*, the Supreme Court clarified in *People v Steanhouse*, ___ Mich ___; ___ NW2d ___ (2017) (Docket Nos. 152671, 152849, 152871, 152872, 152873, 152946, 152947, 152948); slip op at 5, 10, that *Lockridge* rendered the guidelines purely advisory and that judicial fact-finding was appropriate under advisory-sentencing guidelines.

Therefore, we reject defendant's argument that the trial court erred in not scoring the sentencing guidelines without using judge-found facts and in not comparing the minimum sentence ranges that resulted from using and not using judge-found facts.

The Trial Court Properly Considered the 2012 Sentence Reduction. We also reject defendant's argument that, in contravention of the instruction in *Lockridge*, 498 Mich at 398, that a trial court is to consider the circumstances existing at the time of the original sentence in determining whether it would have imposed a materially different sentence, the trial court considered the fact that it had reduced defendant's sentence by 24 months in 2012. The trial court had to consider the 96-month sentence it imposed in 2012 after a panel of this Court remanded for resentencing. It was defendant's appeal of his 96-month sentence that led to the Supreme Court's remand order. On remand, the trial court had to determine whether, upon knowing that the sentencing guidelines were advisory, it would have imposed a materially different sentence than the 96-month sentence it imposed. And in making that determination, the trial court stated that given defendant's conduct in choking Rogers and defendant's criminal history, any reduction in defendant's sentence would be unconscionable. The trial court did not reference any conduct or behavior engaged in by defendant after he was originally sentenced in 2009 or resentenced in 2012.

Defendant Received Proper Notice of the Crosby *Remand Procedure.* Defendant next argues that, because he was notified that the June 20, 2016 hearing was a resentencing hearing, he did not receive proper notice that the trial court, at the hearing, would determine whether it would have imposed a materially different sentence but for the unconstitutional constraint on its discretion. We disagree.

To comply with due process requirements, notice must be given sufficiently in advance of the scheduled court proceeding so that reasonable opportunity to prepare will be afforded. *In re Gault*, 387 US 1, 33; 87 S Ct 1428; 18 L Ed 2d 527 (1967). The Supreme Court's remand order specified that the trial court was to follow the procedures set forth in part VI of the *Lockridge* opinion for a *Crosby* remand. *Jones*, 499 Mich at 876. In a *Crosby* remand, a trial court must determine whether it would have imposed a materially different sentence but for the unconstitutional constraint on its discretion, and upon making this determination, "the trial court shall either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the Defendant present, resentence" the defendant. *Lockridge*, 498 Mich at 398 (internal quotation marks and citation omitted).

Defendant asked the trial court to resentence him, and before the trial court ordered defendant to appear on June 20, 2016, it did not place any decision on the record with an

appropriate explanation regarding whether it would have imposed a materially different sentence but for the unconstitutional constraint on its discretion on the record. Thus, before the trial court could resentence defendant, it first had to place on the record its decision regarding whether it would have imposed a materially different sentence. *Id.*

Despite the trial court's imprecise use of "resentencing" as a shorthand to explain the purpose of defendant's June 20, 2016, hearing, we find that the Supreme Court's remand order sufficiently noticed defendant of the trial court's need to determine if it would have imposed a materially different sentence absent the unconstitutional constraint imposed on its discretion by the pre-*Lockridge* mandatory-sentencing guidelines. Accordingly, we conclude that defendant was not unconstitutionally deprived of his due process right to notice.

The Trial Court Properly Handled the Crosby *Remand.* Defendant also argues that the trial court failed to follow the appropriate procedures of a *Crosby* remand in several ways. Again, we disagree.

First, defendant claims that the trial court never notified him of his opportunity to avoid resentencing. The trial court did not inform defendant of his opportunity to avoid resentencing, but nothing in *Lockridge* required the trial court to do so. A *Crosby* remand must include an opportunity for the defendant to avoid resentencing by promptly notifying the trial court that resentencing will not be sought. *Lockridge*, 498 Mich at 398. The trial court gave defendant this opportunity, and defendant notified the trial court that he wanted to be resentenced.

Second, defendant claims that the trial court never appointed counsel for defendant and never sought the views of counsel. In a *Crosby* remand, if a defendant does not timely notify a trial court whether he wants to be resentenced, a trial court should obtain the views of counsel. *Id.* Because defendant notified the trial court that he wanted to be resentenced, the trial court did not need to seek the views of counsel. In addition, as discussed later in this opinion, the trial court did appoint counsel for defendant and that counsel represented defendant effectively.

Third, defendant claims that the trial court did not place on the record an appropriate explanation for a sentence that was more than double the highest end of the minimum sentence range. As explained infra, defendant's minimum sentence of 96 months was not a departure sentence. In a *Crosby* remand, if a trial court decides not to resentence the defendant, it must place an appropriate explanation for its decision on the record. *Id*. The trial court provided an appropriate explanation for its decision not to resentence defendant: it stated that, because of the nature of the assault and defendant's criminal history, it would be almost unconscionable to give defendant a shorter sentence. Defendant's argument that the trial court failed to comply with the requirements of a *Crosby* remand is without merit.

Defendant's Sentence Is Not Entitled to Reasonableness Review. Defendant argues that his sentence was an unreasonable and disproportionate departure sentence, rising to the level of cruel and unusual punishment. The premise of defendant's claim is that the minimum sentence range was 10 to 46 months, which results when judge-found facts are not used to score OVs 9 and 12. As already explained, however, following *Lockridge*, a trial court may still use judge-found facts to score the guidelines. Because defendant's sentence of 96 months fell within the minimum sentence range of 29 to 114 months, defendant's sentence was not a departure.

Sentences within the guidelines are presumptively proportionate and must be affirmed on appeal absent other error. *People v Jackson*, __ Mich App __, __; __ NW2d __ (2017) (Docket No. 332307); slip op at 8. Because the sentence subject to this appeal was not the product of other error, defendant's sentence is not subject to reasonableness review.

B. Defendant Was Not Unconstitutionally Denied the Effective Assistance of Counsel

Defendant also argues that he was denied effective assistance of counsel at the *Crosby* remand hearing. Because defendant did not move the trial court for a new trial or an evidentiary hearing, our review of the ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). Most claims of ineffective assistance of counsel are analyzed under the test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), in which counsel is presumed effective, and the defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, it is reasonably probable that the results of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The Supreme Court has identified three additional "rare situations" in which counsel's performance is so deficient that prejudice is presumed. *Id.* Prejudice will be presumed where (1) there was the complete denial of counsel at a critical stage of trial, (2) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or (3) counsel is called on to render assistance under circumstances where competent counsel very likely could not. *United States v Cronic*, 466 US 648; 659-660; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Here, defendant argues that prejudice should be presumed because he was denied counsel at the June 20, 2016 hearing. The record makes clear, however, that Mr. Robert Champion, an attorney, represented defendant at the *Crosby* hearing. Therefore, there was not a complete denial of counsel.

Defendant also argues that prejudice should be presumed because, even though Mr. Champion was in the courtroom, Mr. Champion failed to subject the prosecution's case to meaningful adversarial testing. For prejudice to be presumed for counsel's failure to test the prosecution's case, the failure must be complete. *Frazier*, 478 Mich at 244. At the June 20, 2016 hearing, Mr. Champion argued that the trial court should resentence defendant because the trial court had used the assault on Deborah, of which defendant had been acquitted, to score the OVs, and had the trial court not engaged in judicial fact-finding, the guidelines would have resulted in a lower minimum sentence range.

We acknowledge that Mr. Champion, in making this argument, improperly stated that if the assault on Deborah was not considered, defendant would have an OV score of 30 points and the minimum sentence range would have been 19 to 76 months. Notwithstanding this lone mistake, Mr. Champion still argued, as defendant steadfastly believes, that defendant was entitled to be resentenced because the trial court had originally intended to sentence him within the minimum sentence range and defendant's sentence for the assault conviction was outside the

minimum sentence range. Accordingly, Mr. Champion did not fail to subject the imposed sentence to meaningful adversarial testing. Defendant was not denied effective assistance of counsel.

C. This Court's Review Is Limited by the Supreme Court's Remand Order

Defendant raises numerous other claims in his Standard 4 brief regarding his sentence for the assault conviction or the trial court's decision not to resentence him. First, defendant argues that he was unconstitutionally denied the effective assistance of counsel in proceedings before the trial court in 2009 and 2012, and on appeal in 2012. Defendant also argues that the use of conduct for which he was acquitted to score OVs 9 and 12 subjected him to successive prosecutions for the conduct, violating his right to be free from double jeopardy. Defendant argues that his protection against ex post facto laws, US Const, art I, § 10, was violated because *Lockridge*, by removing the requirement that any departure from the minimum sentence range be supported by substantial and compelling reasons, allowed the trial court to impose a harsher sentence than it could have imposed before *Lockridge* was decided and the minimum sentence range was mandatory. And, defendant argues that he was entitled to have his sentence vacated and then be resentenced. We are without authority to address any of these arguments.

In this case, the Supreme Court remanded to the trial court "to determine whether the court would have imposed materially different sentences under the sentencing procedure described in" *Lockridge* and for consideration of defendant's arguments concerning the imposition of costs. *Jones*, 499 Mich at 876. "[W]hen an appellate court gives clear instructions in a remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). Each of defendant's arguments outlined above exceeds the scope of the Supreme Court's remand order and we decline to address them.

D. Remand Is Necessary for the Trial Court to Articulate a Factual Basis for Imposing Costs

Finally, defendant argues that the trial court imposed court costs without articulating a factual basis for the costs and imposed an attorney fee without conducting an ability-to-pay assessment. The trial court ordered defendant to pay $500 in court costs in each case and $500 in attorney fees in the assault case.

The Trial Court Did Not Articulate a Factual Basis for the Imposition of Costs. The trial court had authority under MCL 769.1k(1)(b)(*iii*) to impose court costs. To impose court costs, however, a trial court must establish a factual basis for the costs. *People v Konopka (On Remand)*, 309 Mich App 345, 359-360; 869 NW2d 651 (2015). Absent a factual basis for the court costs imposed, this Court cannot determine whether the costs imposed were reasonably related to the actual costs incurred by the trial court as required by MCL 769.1k(1)(b)(*iii*). *Id*.

Here, the trial court never provided a factual basis for the court costs. It did not do so when it resentenced defendant in 2012, at which time it lowered the imposed costs from $1,500 to $500 in each case, or during the *Crosby* remand. We remand for the trial court to establish a factual basis for the $500 in court costs imposed in each case or, if appropriate, to alter the amount. *Id.* at 360.

Defendant Is Not Entitled to an Ability-To-Pay Assessment. A trial court may also impose attorney fees on a defendant. MCL 769.1k(1)(b)(*iv*). The statute does not require a trial court to conduct an ability-to-pay assessment before imposing attorney fees on a defendant. *People v Jackson*, 483 Mich 271, 286; 769 NW2d 630 (2009). The Sixth Amendment right to counsel also does not require an ability-to-pay assessment before a trial court imposes a fee on a defendant for a court-appointed attorney, but a defendant is entitled to an ability-to-pay assessment when the imposition of the fee is enforced. *Id.* at 290-292. When enforcement has begun and a defendant timely objects based on his inability to pay, a trial court should evaluate the defendant's ability to pay. *Id.* at 292-293. The operative question of the evaluation is whether the defendant is indigent and unable to pay or whether forced payment would work a manifest hardship on the defendant. *Id.*

In the present case, defendant makes no argument that the imposition of attorney fees has been enforced. Accordingly, we reject defendant's argument that he was entitled to an ability-to-pay assessment.

III. CONCLUSION

We reject defendant's arguments that the trial court improperly handled defendant's *Crosby* remand. We decline to reach several of defendant's arguments on appeal as those claims of error exceed the scope of the Supreme Court's remand order. We conclude that defendant was not unconstitutionally deprived of his right to effective counsel at the June 20, 2016, *Crosby* hearing and that defendant is not entitled to an ability-to-pay assessment regarding the imposition of attorney fees. We remand this case, however, for the trial court to articulate a factual basis for the award of costs.

We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey